U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 19 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision.** The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director) and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a software service firm. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The director found that the job offered does not require a professional with at least a master's degree or a bachelor's degree plus five (5) years of experience, and the beneficiary did not meet the requirements for classification as an advanced degree professional.

The petitioner's appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Classification as an Advanced Degree Professional

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

The beneficiary's degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that a beneficiary is an advanced degree professional is any less than the evidence required to show that the beneficiary is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30706 (July 5, 1991).[2]

Thus, the plain meaning of the Act and the regulations is that the beneficiary of an advanced degree professional petition must possess, at a minimum, a degree from a college or university that is a U.S. baccalaureate degree or a foreign equivalent degree.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[3] The priority date of the petition is April 17, 2013.[4] Part H of the labor certification states that the offered position has the following minimum requirements:

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[2] *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability").

[3] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[4] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

H.4. Education: Bachelor's degree in Computer Science, Electronic/Electrical Engineering, Engineering Math or equiv.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Five years' experience in the job offered. Note 1: For evaluating experience in the offered position under item H (6), employer will consider only substantive past job duties, irrespective of the job titles designated by the past employers. Note 2: Employer will accept as equiv. education and/or training recognized as equiv. to a Bachelor's degree in the relevant country and found comparable to a U.S. Bachelor's degree evaluated according to EDGE by a college professor authorized to issue college level credits. Relocation Possible. Note 3: To clarify any potential doubts raised by defects in form 9089, employer hereby notes for the record that entries from H-4 through H-10B should be read to mean that the employer requires: Bachelors in Computer Science, Electronic/ Electrical Engineering, Engineering, Math or equivalent with Five years' experience in the job offered.

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in electronic engineering from the India, completed in 1997. The record contains a copy of the beneficiary's certification that he passed Sections A and B of the and the corresponding transcripts covering 1995 through 1998. The record also contains results from the Technical Examinations Board, from 1990 through 1993.

The record contains a May 18, 2012 evaluation of the beneficiary's educational credentials prepared by Professor Department of Statistics and Computer Information Systems for [5] The evaluation states that the beneficiary's passage of the sections A and B of the Examinations in is equivalent to a U.S. Bachelor of Science degree in Electronic Engineering.

The record also contains an evaluation of the beneficiary's educational credentials prepared by for the on December 3, 2013. The evaluation states that the beneficiary's 1998 passage of sections A and B of the examinations in

[5] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

electronics and communication resulted in Associate Membership in and is a single-source 4-year foreign equivalent degree to a Bachelor of Science in electronic engineering from an accredited university in the United States.

The Electronic Database for Global Education (EDGE) was created by AACRAO. EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* We consider EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[6] EDGE confirms that the beneficiary's passage of section A and B of the institute examinations resulted in associate membership in the which "represents attainment of a level of education comparable to a bachelor's degree in the United States."

As is explained above, for classification as an advanced degree professional, the beneficiary must possess a foreign degree from a college or university that is equivalent to a U.S. bachelor's degree. Although AACRAO and EDGE confirm that Associate Membership in is comparable to a U.S. bachelor's degree, it is not a degree from a college or university. The is not an institution of higher education that can confer a degree.[7] *See* (accessed May 21, 2015). Therefore, the beneficiary possesses the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree" within the meaning of 8 C.F.R. § 204.5(k)(2).

After reviewing all of the evidence in the record, it is concluded that the petitioner has not established that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

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[6] In *Confluence International, Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano,* 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS,* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification required a degree and did not allow for the combination of education and experience.

[7] *See Snapnames.com, Inc. v. Michael Chertoff,* 2006 WL 3491005 at 11 (D. Ore. Nov. 30, 2006) (finding USCIS was justified in concluding that membership was not a college or university "degree" for purposes of classification as a member of the professions holding an advanced degree).

Proffered Position

As discussed above, the plain meaning of the Act and the regulations is that the beneficiary of an advanced degree professional petition must possess, at a minimum, a degree from a college or university that is a U.S. baccalaureate degree or a foreign equivalent degree. The issue is that the proffered position's minimum requirements, as stated on the labor certification, do not meet the minimum qualifications required for classification as an advanced degree professional.

The petitioner contends that the language "Note 2: Employer will accept as equiv. education and/or training recognized as equiv. to a Bachelor's degree in the relevant country and found comparable to a U.S. Bachelor's degree evaluated according to EDGE by a college professor authorized to issue college level credits," used in section H.14, does not mean that it would accept less than the baccalaureate degree and 60 months of experience required by for classification as an advanced degree professional. The petitioner contends that the language requires qualifications that are functionally equivalent to a bachelor's degree and 60 months of experience.

We must look to the job offer portion of the labor certification to determine the required qualifications for the position and cannot ignore a term of the labor certification or impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). We interpret the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer" and our interpretation of the job's requirements must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In the instant case, we find that the plain language of section H.14 is that the petitioner would accept less than an actual bachelor's degree or foreign equivalent degree. Specifically, the employer will accept education and/or training recognized as equivalent to a bachelor's degree in the relevant country and noted in EDGE by a college professor authorized to issue college level credits to be comparable to a U.S. bachelor's degree. As is discussed above, some education and/or training that may be recognized as equivalent to a bachelor's degree in one country and noted in EDGE as comparable to a U.S. bachelor's degree may not be considered a foreign equivalent degree within the meaning of 8 C.F.R. § 204.5(k)(3)(i)(B). Therefore the position does not qualify for classification as an advanced degree professional.

Classification as a Professional

On appeal, the petitioner states that it would accept classification of the beneficiary as a professional pursuant to Section 203(b)(3)(A)(ii) of the Act.[8] A petitioner may not make material changes to a

[8] Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Therefore, we will not consider whether the beneficiary meets the requirements for classification as a professional.

Ability to Pay

Beyond the decision of the director,[9] we find that the petitioner has not established its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The proffered wage as stated on the ETA Form 9089 is $111,072.00 per year. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in and to currently employ 48 workers.

The regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The record of proceeding does not contain the regulatory required evidence of the petitioner's ability to pay the proffered wage in 2013 and 2014.[10] Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner did not submit annual reports, federal tax returns, or audited financial statements establishing that it had the continuing ability to pay the proffered wage as of the August 12, 2014 priority date. Without the regulatory required evidence, we are unable to accurately assess the petitioner's ability to pay the proffered wage. Therefore, the petitioner has not established its ability

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[9] We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

[10] We note that the record contains the petitioner's 2012 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. However, the petition must establish its ability to pay the proffered wage from 2013 onwards. We also note that the record contains the beneficiary's 2013 Form W-2, Wage and Tax Statement demonstrating that the petitioner paid the beneficiary less than the proffered wage. However, this evidence may not be substituted for evidence required by the regulation.

to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

According to USCIS records, the petitioner has filed at least six (6) Form I-140 immigrant petitions on behalf of other beneficiaries since 2013, the year of the priority date. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.